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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-658

CITY OF KENOSHA,
A Wisconsin Municipal Corporation;
CITY OF RACINE,
A Wisconsin Municipal Corporation;
ROBERT W. WARREN,
Attorney General of the State of Wisconsin,
Intervening Defendant;
Appellants,

v.

PETER G. BRUNO;	No. 71-C-330
BRUCE BLEASHKA;	No. 71-C-331
SLEEPY'S, INC.;	No. 71-C-332
FRED KAUZRICH;	No. 71-C-333
JEANETTE STENZEL;	No. 71-C-334
CHARLES WIGINTON;	No. 71-C-352
RICHARD A. MISURELLI and TERRANCE MC CUE;	No. 71-C-316
GO-GO OF RACINE, INC., A Wisconsin Corporation, THEODORE F. WITHERIL, and JEROME J. RUETZ, JR.; and	No. 71-C-317
DAVID H. ROBERS;	No. 71-C-335

Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF WISCONSIN

REPLY BRIEF

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April 13, 1973

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REPLY BRIEF

ARGUMENT

I. Due Process Claims Are Novel But Not Convincing.

A. Refusal of liquor license is not deprivation of "liberty" within the meaning of the due process clause of the Fourteenth Amendment .

The brief filed on behalf of appellees Sleepy's, Inc., Kauzrich, and Wiginton adopts a novel theory of "liberty" in order to squeeze their case into the due process provisions of the Fourteenth Amendment. They claim that the following language in *Board of Regents v. Roth* (1972), 408 U.S. 564, 570-571, 92 S.Ct. 2701, 2707, 33 L.Ed. 2d 548, supports the view that the denials of their liquor license renewals deprived them of "liberty" without due process of law:

> "There *might* be cases in which a State refused to re-employ a person under such circumstances that interests in liberty would be implicated. But this is not such a case. [Emphasis supplied].
>
> "* * * It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case. For '[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.' Wisconsin v. Constantineau, 400 U.S. 433, 437, 91 S.Ct. 507, 510, 27 L.Ed. 2d 515; * * *."

Appellees, in urging the unconstitutionality of the manner in which their liquor license renewal applications were denied, have indulged at least one totally speculative, which is to say legally insubstantial, premise: namely, that the reasons for the denial of their renewal applications were in fact and effect tantamount to the judgment that the appellees themselves lacked "good moral character." In fact this is false for the simple reason that the moral integrity of the appellees themselves is not the underlying issue here. Nude dancing or, more importantly, the manifest effect of nude dancing combined with liquor sales on the appellants, cities of Racine and Kenosha, is. By denying appellees the renewal of their individual liquor licenses, appellants have accomplished nothing more than the effectuation of their determination that nude dancing where liquor is sold was, to say the least, not in the best interests of their respective communities. To urge otherwise is at best idle speculation.

Why didn't the city councils favor nude dancing in their taverns? Legislatively, they determined that it was not in the best interests of their communities. Under Wisconsin law the cities may do so individually just as the California Department of Alcoholic Beverage Control could do so in *California v. LaRue* (1972), — U.S. —, 93 S.Ct. 390, 34 L.Ed. 2d 342, the only difference being that local option in Wisconsin permits the cities, villages, and towns to regulate these matters by *ordinance* or *resolution*. *Bjordal v. Town Board* (1939), 230 Wis. 543, 547, 284 N.W. 534.

The nude dancing activities described in pages 64-72 of the appendix may give some hint as to why the municipalities involved herein decided not to license a combination of liquor and nude dancing. Judicial notice can be taken of the California

experience in regard to the same combination. *LaRue*, 93 S.Ct. 393. There is no showing in the record leading to summary judgment that "good moral character" required of a liquor licensee by sec. 176.04 (9), Wis. Stats., was at issue in any of the cases involved in this appeal.

Thus, insofar as it must be considered mere speculation on the part of appellees to argue that they were "branded as persons of bad moral character" (appellees' brief, at p. 17) when their renewal applications were denied, their argument that they have been deprived of liberty without due process of law must be considered equally speculative.

B. No "property" interests stated.

Appellees' argument that the Wisconsin Supreme Court has interpreted legislation requiring stated reasons for denial of renewal of liquor licenses as creating a property right is self-defeating.

As was stated in *State ex rel. Boroo v. Town Board* (1960), 10 Wis. 2d 153, 160-161, 102 N.W. 2d 238, the statute involved, sec. 176.05 (8), Wis. Stats., enables the reviewing court to determine if the action was arbitrary, capricious, discriminatory, or an abuse of discretion. Thus, the Wisconsin courts provide protection against arbitrary denials. The aid of the federal court system is not needed.

As this court said in *Roth*, property interests are not created by the constitution. They come from such sources as state law. No such source has been shown by appellees. The investment of $20,000 that each appellee is stipulated to have must represent real estate, fixtures and stock. The

license has no value under Wisconsin law. *State ex rel. Ruffalo v. Common Council* (1968), 38 Wis. 2d 518, 157 N.W. 2d 568.

II. Due Process Does Not Require Adversary Hearing.

A. Minimal procedural due process met by legislative hearing.

If minimal procedural due process is required in a liquor license situation, the standards adopted by the district court in *Roth*, 310 F. Supp. 972, 979-980, approved by the court of appeals, 446 F. 2d 806, 809-810, and approved by Mr. Justice Douglas in his dissenting opinion in *Roth*, would be sufficient where factual issues arise and the applicant specifically asks the licensing body for such opportunity to submit evidence relevant to the stated reasons:

> "* * * I hold that minimal procedural due process includes a statement of the reasons why the university intends not to retain the professor, notice of a hearing at which he may respond to the stated reasons, and a hearing if the professor appears at the appointed time and place. At such a hearing the professor must have a reasonable opportunity to submit evidence relevant to the stated reasons. The burden of going forward and the burden of proof rests with the professor. Only if he makes a reasonable showing that the stated reasons are wholly inappropriate as a basis for decision or that they are wholly without basis in fact would the university administration become obliged to show that the stated reasons are not inappropriate or that they have a basis in fact." 92 S.Ct. 2713.

If the liquor licensees who were denied renewal petitioned the city council of the respective cities to hold a hearing on the issue of whether they had or intended to feature nude dancing or on the question of whether nude dancing caused the problems referred to by the city involved, a Wisconsin court could determine whether subsequent action by the city was "arbitrary, capricious or discriminatory." However, no such request was made by any of the appellees.

The hearing which the court in *Roth* said would be necessary to clear "good name, reputation, honor or integrity" would not assure reemployment where nonretention is justified on other grounds. The Honorable John W. Reynolds, Judge of the United States District Court for the Eastern District of Wisconsin, so construed *Roth* in a decision issued on March 31, 1973. *Alan Whitney v. Board of Regents of the University of Wisconsin*, No. 72-C-317. This conclusion seems inescapable in view of footnote 12 in *Roth*, 92 S.Ct. 2707.

B. No free speech issues involved.

The tavernkeepers interests in exercising rights of free speech and expression are illusory. This court set the matter clearly in focus in *LaRue*, 93 S.Ct. 390:

> "* * * While we agree that at least some of the performances to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression, the critical fact is that California has not forbidden these performances across the board. It has merely proscribed such performances in establishments which it licenses to sell liquor by the drink."

Likewise, the cities of Racine and Kenosha under the local option laws of Wisconsin can decide not to mix naked bodies and alcohol.

There is nothing in the actions of the two cities which would prevent these entrepreneurs from having their shows in local churches, YMCA's, art centers, or other civic organizations which may want to stage such forms of art.

Respectfully submitted,

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April 13, 1973

CERTIFICATE OF SERVICE

I, the undersigned, a member of the Bar of this Court, do hereby certify that on April 19, 1973, I duly mailed three copies of the Reply Brief of appellants to each of the attorneys for the appellees, addressed as follows:

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